

**Midwest Motel Management Corp. of Birmingham
and Curtis L. Lewis, Jr. Case 10-CA-17099**

May 7, 1982

DECISION AND ORDER

**BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER**

On February 18, 1982, Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Midwest Motel Management Corp. of Birmingham, Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

“(a) Offer Curtis L. Lewis, Jr., immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings suffered by reason of the discrimination against him, in the manner set forth in the section of this Decision entitled ‘The Remedy.’”

2. Substitute the attached notice for that of the Administrative Law Judge.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In his recommended Order, the Administrative Law Judge inadvertently failed to include the make-whole portion of the remedy for Lewis' discharge. We shall amend the recommended Order to correct this error. We have modified the Administrative Law Judge's notice to conform with his recommended Order.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT unlawfully ask you about your activities or the activities of other employees on behalf of Retail, Wholesale and Department Store Union, or any other labor organization.

WE WILL NOT promise you money if you refrain from supporting a union or for dissuading other employees from supporting a union.

WE WILL NOT threaten you with discharge if you support a union.

WE WILL NOT ask you to solicit other employees to withdraw their support for a union.

WE WILL NOT threaten you with more strict enforcement of work rules if you support a union.

WE WILL NOT unlawfully surveil you through the presence of one of our supervisors at a union meeting you may be conducting.

WE WILL NOT discharge employees because they are active on behalf of a Union.

WE WILL NOT in any like or related manner interfere with, restrain, coerce, or discriminate against you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer Curtis L. Lewis, Jr., immediate and full reinstatement to his former position of employment or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make Curtis L. Lewis, Jr., whole, with interest, for any loss of pay he may have suf-

ferred as a result of our discharging him on June 12, 1981.

**MIDWEST MOTEL MANAGEMENT
CORP. OF BIRMINGHAM**

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: This case was heard before me in Birmingham, Alabama, on December 8 and 9, 1981, pursuant to the August 26, 1981, complaint and notice of hearing issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 10 of the Board. The complaint is based on a charge filed by Curtis L. Lewis, Jr. (Lewis or the Charging Party herein), against Midwest Motel Management Corp. of Birmingham (Respondent or Midwest herein).

In the complaint the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by interrogating and threatening employees, and interfering with their Section 7 rights by other conduct, and Section 8(a)(3) of the Act by discharging Lewis on June 12, 1981.¹

By its answer, Respondent admits certain allegations, but denies that it has violated the Act in any manner.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Alabama corporation, is engaged in operating the Best Western Airport Motel in Birmingham, Alabama. During the first 4 months of operation in 1981, Respondent received gross revenues which, when projected over a 12-month period, will exceed \$500,000. Based on this 4-month history, Respondent at the end of a 12-month period will have purchased and received at its Birmingham, Alabama, location goods valued in excess of \$50,000 directly from suppliers located within the State of Alabama who in turn will have purchased and received said goods directly from suppliers located outside the State of Alabama. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Retail, Wholesale and Department Store Union (the Union herein) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Principal Issues

Did Respondent discharge Curtis L. Lewis, Jr., on June 12 because of his union activities, as alleged by the General Counsel, or was he fired because, as Respondent states at brief page 19:

In this case, the company acted as prudently as possible. They kept an employee, who was organizing but was incompetent, until after the union's activities were over, and then dismissed the incompetent employee.

B. Early Chronology

1. Midwest becomes the motel owner on January 1

Hired by Respondent's predecessor on June 1, 1979, as maintenance supervisor of the Birmingham airport motel, Lewis was retained in that capacity for 2 months after Respondent became owner and operator of the 120-room motel on January 1. N. J. D'Adamo was appointed the new manager, replacing Elizabeth Turner. Under Turner, the motel usually employed an assistant for Lewis.

Hans Schmalfeldt, who owns a one-half interest in Respondent,² testified that he had visited and inspected the motel on different occasions during the last 9 months or so of 1980. According to Schmalfeldt, whose background is in maintenance, the motel needed many routine repairs. Shortly before the motel sale, the previous owner, Bill Ash, supposedly told Schmalfeldt that Lewis was not a good maintenance supervisor and advised Schmalfeldt to replace him. As Ash's remarks confirmed Schmalfeldt's observations, the latter told D'Adamo:

At your earliest convenience I'd like to see Mr. Lewis replaced as maintenance supervisor. We need somebody with greater capability in that position.

2. Lewis is demoted on March 1

The credited testimony of Sales Director (and also D'Adamo's secretary) Carol Smith, front desk clerk Greta Strong, and Executive Housekeeper Ida Belle Davis reflects that in the January-February period there were constant repair problems, ranging from minor to major, at the motel. Smith witnessed D'Adamo complain to Lewis about these matters in late January and early February.³ I credit Lewis' testimony that about 10

² He testified that Charles M. Trout owns the other 50 percent.

³ Smith testified that, while Respondent utilized a disciplinary system which ranged from oral reprimands, written warnings, and suspensions to dismissal, the usual procedure was for management to discuss problems with the affected employees. There were instances, however, when employees received written reprimands, and these, or copies of them, were placed in Respondent's files.

While D'Adamo, as I find, did complain orally to Lewis about maintenance problems, I credit Lewis' testimony that D'Adamo never warned or reprimanded him. That is, I find that D'Adamo neither told Lewis that their talks were oral reprimands, nor did D'Adamo so classify them under Respondent's formal disciplinary system.

¹ All dates shown are for 1981 unless otherwise indicated.

rooms would be blocked (not for rent except at a reduced rate) because of television problems,⁴ and that D'Adamo told Lewis that the budget would not permit the expense of certain repairs to unblock other rooms because he was spending the money in other areas.⁵ While the rooms with the bad TVs (some worked, but only as black and white sets since the color was out) could rent at a discounted rate, the rooms blocked for repairs would not be rentable.

Although Respondent's witnesses credibly described an undesirable state of repair of the motel, it is clear, and I find, that it was not all the fault of Lewis. Moreover, front desk clerk Strong, called by Respondent, testified that in her opinion Lewis repaired the maintenance problems to the best of his ability. As we shall see later, Strong's assessment coincides with the evaluation of Lewis' replacement, Robert N. Coates.

Schmalfeldt further testified that in February D'Adamo complained to him about Lewis' performance and requested permission to hire Robert N. Coates as the maintenance supervisor, explaining that Coates had served him in that capacity at a Holiday Inn in New Castle, Indiana. Schmalfeldt gave his approval.⁶ Coates became Respondent's maintenance supervisor on March 1, and Lewis was demoted to his assistant. Lewis testified that his demotion included a reduction in pay from \$1,000 to \$800 a month. Lewis conceded that he agreed to stay as maintenance helper and learn from Coates. However, Lewis credibly testified that D'Adamo told him he had cut back in all departments since the motel budget was overspent. Lewis credibly denied that D'Adamo said anything to him about his continued employment being contingent on his learning more about his job from Coates. Indeed, Coates himself testified that, when he talked to Lewis on March 1 about staying on as his assistant, he said nothing to Lewis about his continued employment being contingent upon anything. As far as Coates was aware, Lewis was not told of any contingency.

Before passing to other topics, it should be noted that the record amply supports the finding, which I make, that, after Coates' arrival, maintenance became much less of a problem, and items which were repaired, in contrast

to previous months, stayed fixed. In short, the presence of Coates was a decided improvement. Coates testified that he left Respondent's employ on October 1.

C. Preelection Events

1. Lewis contacts the Union

On an unspecified date before March 1, Lewis contacted Union Representative Robert Jackson relative to organizing the motel's employees. Jackson told Lewis that Lewis could not participate in an organizing campaign because of his supervisory status.

Within a week after his demotion, Lewis recontacted Jackson, who approved Lewis' participation. Thereafter, Lewis picked up authorization cards, distributed leaflets, attended meetings at the union hall, and held about four union meetings at his home. On April 22 the Union filed a representation petition in Case 10-RC-12396, and Lewis served as the Union's observer at the election on May 15—which the Union lost.⁷ Respondent and its witnesses conceded knowledge of Lewis' prominent role in the Union's campaign.

2. D'Adamo's countercampaign

a. The April 14 conversation with Lewis

Lewis testified that, around 5 p.m. on April 14, D'Adamo invited him to have a seat with him in the motel's restaurant. Just the two of them were present at the table. D'Adamo said he was very disappointed, for he found out that someone was talking behind his back. Lewis asked what he meant. D'Adamo explained that one of the ladies in the motel lounge had told him that Lewis had asked her to sign a union card and that she did not want to be involved with the Union. D'Adamo then asked Lewis how he stood with the Union.⁸ Lewis responded that he was for the Union 100 percent because he thought it would help him and the employees. D'Adamo responded that he could give Lewis two choices. He said that he could either have Lewis "hit" before he walked out the door or have Lewis fired.⁹ Lewis testified that D'Adamo then spoke in an angry tone telling him to come to the office.

In the office D'Adamo told Lewis that the motel was preparing to spend \$87,000 to add a new wing to the motel, and that, if Lewis would talk to the other employees and get them to change their minds about "it," there would be more money in Lewis' pocket when the motel made some money, but that Lewis would have to play ball with D'Adamo.¹⁰ Lewis responded that he was for

⁴ As Lewis credibly explained on rebuttal, D'Adamo planned to co-ordinate the service contracts on the television sets so as to get the new sets and old ones under one contract. Until that occurred, he did not want to spend money repairing them.

⁵ D'Adamo left Respondent's employ around October 1, and did not testify. Smith testified that a criminal proceeding, initiated by charges filed by Respondent's owners, is pending against D'Adamo based on certain (unidentified) conduct of his in his motel management capacity.

Respondent's counsel represented that he did not know the whereabouts of D'Adamo (Schmalfeldt testified that he was somewhere in Birmingham) and that he had learned the name of D'Adamo's attorney only the day before the instant hearing. Furthermore, counsel represented that he had made no effort to contact D'Adamo, through his attorney, because of his belief that the attorney would not permit D'Adamo to testify here for fear of waiving his fifth amendment rights in the criminal proceeding and because of possible hostility.

⁶ The record does not disclose why D'Adamo waited until February to make this request in light of Schmalfeldt's December 1980 instruction to replace Lewis, nor is there any explanation why D'Adamo, according to Schmalfeldt, requested "permission" to replace Lewis with Coates. Schmalfeldt did not explain these matters, and D'Adamo, as noted above in fn. 5, did not testify.

⁷ The tally of ballots reflects that, of an approximate 45 eligible voters, 12 voted for the Union, 20 voted against, and 4 cast challenged ballots (Resp. Exh. 2).

⁸ Complaint par. 7 alleging interrogation.

⁹ Complaint par. 9 alleging threat of discharge. On cross-examination Lewis explained that by "hit" D'Adamo meant he would kill Lewis and by "fired" he meant that D'Adamo would fire him. He emphasized that he did not withdraw his support for the Union, that D'Adamo knew that, and that D'Adamo did not fire him until about 2 months later on June 12.

My conclusions respecting this conversation are reported below.

¹⁰ Complaint par. 8 alleging unlawful promise of benefits.

the Union regardless of what D'Adamo was going to do. Over objection, Lewis testified that he understood D'Adamo to mean that, if Lewis would talk to the other employees and dissuade them from supporting the Union, then when the motel made money D'Adamo was going to put money in the pocket of Lewis for helping him put a stop to the union activities. He explained that D'Adamo had said that he thought Lewis was the leader, the intelligent one, and that he was telling Lewis this because he thought he had more influence.

b. The April 16 conversation with Lewis

Two days later around 5:30 in the evening, Lewis reported to D'Adamo in the latter's office. Only the two were present. D'Adamo said that Union Representative Jackson had telephoned him and said that the Union had enough names to file an election petition at that time and that he wanted to see what D'Adamo thought about it. D'Adamo then told Lewis that he wanted Lewis to call a meeting of the other employees and to dissuade them from supporting the Union.¹¹

Lewis testified that about 10 o'clock in the morning, 4 days later on April 20, he did conduct a meeting with the employees concerning the union question. D'Adamo had a notice posted on the timeclock advising employees that it was permissible for them to attend the meeting. Lewis testified that about 80 percent of the motel employees were present, including Kitchen Supervisor Gay Carter.¹² Lewis testified that the meeting resulted with those who had signed union cards expressing a desire to proceed in support of the Union and those who had not signed cards wanting to talk to a union representative to find out more concerning what would happen if the motel became unionized.

In compliance with D'Adamo's previous instructions, Lewis reported the result of the meeting to him. D'Adamo responded, "Okay, that's okay, partner, I appreciate that. I will just call one and tell them the facts about the union, and I'm going to get stricter with it, the rules and regulations. I'm going to enforce them to the letter because since this trouble is starting around." Lewis testified that Maintenance Supervisor Coates was present when Lewis made this report to D'Adamo in the engine room. Although Respondent called Coates, out of order, immediately after Lewis testified, Coates was not asked about this engine room conversation. On the other hand, no paragraph in the complaint alleges that D'Adamo's statement to Lewis about stricter enforcement violated the Act. (Complaint par. 11 makes such an allegation regarding a meeting D'Adamo subsequently held with employees, to be discussed below.)

As earlier noted, D'Adamo did not testify. Sales Director Carol Smith testified that Lewis never said anything to her about being threatened by D'Adamo if he continued his union activities even though she and Lewis talked frequently and had a good relationship. She further testified that Lewis never told her that D'Adamo had offered him more money if he would persuade other

employees not to vote for the Union. While I credit Smith, such fact does not disprove Lewis' testimony.

Over the General Counsel's hearsay objection, I reversed an earlier ruling and permitted Smith to testify that, during the period of April, D'Adamo told her that he knew that Lewis was involved with union activities, that he did not like Lewis talking about the Union on the job, and particularly that he wanted to get the union activities over and done with, but that he wanted to be fair about it. Smith was describing, in ambiguous fashion, reports given to her by D'Adamo of conversations D'Adamo supposedly held with Lewis in the month of April. Although Respondent's counsel specifically asked Smith about the conversations of April 14 and 16, Smith could only generalize.¹³

Conclusions

I credit the testimony of Lewis concerning his description of the April 14 and 16 conversations he had with General Manager D'Adamo. Accordingly, I find that Respondent violated Section B(a)(1) of the Act as alleged in complaint paragraphs 7-10.

As earlier noted, Lewis testified that Supervisor Carter was present at the employee meeting assembled by Lewis. This meeting had the posted approval of General Manager D'Adamo.

Although Respondent denies the supervisory status of Gay Carter, the record reflects that about 3 or 4 weeks after D'Adamo's arrival as general manager he told the kitchen employees that Carter would be their manager and that they were to do as she instructed. Thereafter, she gave them instructions on what work to do and they followed her instructions. Moreover, Carter evaluated the work performance of the kitchen employees and, as Lewis described, attended meetings of only supervisory personnel. She told employees she would have them laid off if they did not follow her instructions. I find that Carter is a supervisor within the meaning of the Act.

In any event, it is clear that Respondent vested Carter with the status of its agent when D'Adamo informed the kitchen employees that she was to be their supervisor and that they were to follow her instructions. As counsel for the General Counsel argues in her brief, employees could reasonably believe thereafter that Carter spoke for and acted on behalf of Respondent and she may be deemed its agent under the law. *Dennis C. Ehrhardt d/b/a Americraft Manufacturing Company*, 242 NLRB 1312, fn. 1 (1979); *Helena Laboratories Corporation*, 225 NLRB 257, 258 (1956), *enfd.* in relevant part 557 F.2d 1183 (5th Cir. 1977). As the Board has held, an employer

¹¹ Complaint par. 10 alleging unlawful solicitation.

¹² Respondent declined to admit Carter's supervisory status. Complaint par. 16 alleges that Carter's presence constituted 8(a)(1) surveillance.

¹³ In her brief, counsel for the General Counsel argues that, since Respondent made no attempt whatsoever to procure D'Adamo's attendance at the hearing, the hearsay exception provided for in Rule 804(a)(5) of the Federal Rules of Evidence was not available as a basis for receiving hearsay testimony regarding D'Adamo's statements. However, the Board has decided that it is not bound to apply strictly the Federal Rules of Evidence concerning hearsay. *United Rubber, Cork, Linoleum and Plastic Workers, Local 878 (Goodyear Tire & Rubber Company)*, 255 NLRB 251, fn. 1 (1981); *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978), enforcement denied without passing on this point 598 F.2d 1267 (2d Cir. 1979). For further treatment of this question, see 3 Davis, *Administrative Law Treatise*, §16:13 (2d ed. 1980).

violates Section 8(a)(1) of the Act when one of its supervisors or agents attends a union meeting. *Porta Systems Corporation*, 238 NLRB 192 (1978), *enfd.* 625 F.2d 399 (2d Cir. 1980). Accordingly, I find that Respondent, by its surveillance through Carter, violated Section 8(a)(1) of the Act as alleged in complaint paragraph 16.

c. D'Adamo's speech of April 21

By complaint paragraphs 11, 13, 14, and 15, the General Counsel alleges that, on or about May 5, General Manager D'Adamo threatened employees with more strict enforcement of work rules if they supported the Union; solicited employees concerning their grievances, contrary to past practice; and promised to remedy such grievances for the purpose of causing the employees to reject the Union.

As the record reflects, D'Adamo made a speech to employees on April 21—the day following the approved meeting Lewis held with employees after which Lewis reported the unfavorable results to D'Adamo. When Counsel for the General Counsel announced that she was seeking to add a new date to complaint paragraph 11 to cover the April 21 speech, Respondent objected on the basis of late notice. I sustained the objection, but permitted counsel for the General Counsel to adduce the evidence as an offer of proof. I thereafter rejected the offer of proof and denied the motion to amend the complaint.

In footnote 2 of her brief, counsel for General Counsel contends that the evidence regarding the speech should be considered inasmuch as the matter was fully litigated with Respondent even adducing evidence concerning the meeting from its own witnesses. I agree that the matter was fully litigated, and I shall consider the evidence for all purposes as if the complaint allegations had alleged April 21 in addition to May 5.

Lewis testified that about 40 percent of the employees were present when D'Adamo gave his speech in a meeting room of the motel. Kitchen Supervisor Gay Carter was also present. In addition to referring to the cost of union dues, D'Adamo told employees that he was going to get stricter with the rules and regulations and enforce the motel's rules to the letter. For example, D'Adamo said that an employee would receive a verbal warning the first time he came in late; the second time he would receive a written warning; and the third time D'Adamo would lay him off or fire him.

Former Maintenance Supervisor Robert N. Coates testified on direct examination that he attended *part* of a meeting in which D'Adamo explained the way the motel rules and regulations would be with the motel unionized. Although he denied that D'Adamo said he would enforce the rules more strictly against employees if they voted in the Union, he testified that D'Adamo said he would enforce the rules and regulations *as written*. On cross-examination Coates stated that on the occasion of this meeting D'Adamo read the rules and that to his knowledge D'Adamo had never done that before.¹⁴

¹⁴ Neither party offered a copy of the rules and regulations in evidence even though Coates testified that employees receive a copy of the work rules when they are employed and sign for such a copy. Sales Director Smith also testified that employees sign copies of the rules.

Coates conceded that D'Adamo said that the motel rules would be adhered to *by the letter* if the Union came in.

General Counsel's witness Martha Robinson, a cook for Respondent, testified that at a meeting in April D'Adamo told employees that he was going to start enforcing everything to the letter, that he had not been doing that in the past, and that he said he was going to get stricter with (enforcing) the rules.

Kitchen employee Ronald D. Gaston testified that he attended a meeting of mostly kitchen and dining room employees at which D'Adamo spoke. According to Gaston, D'Adamo told employees that, if they went through with the Union, he was going to have to tighten up. For example, he said that, if he told them to pick up something off the floor, he wanted it done then and not an hour later. D'Adamo also told employees that, if they had any problems, they could come and discuss them with him and he would attempt to help them.

Gaston testified that D'Adamo told them that he did not like people going behind his back and talking about such things as the Union, and that, if Lewis had come to him and talked with him about the Union, he probably would have agreed with him, but, since Lewis did it behind his back, he did not appreciate that.

Gaston had difficulty placing the date of this speech by D'Adamo, first saying that it was 2 or 3 weeks after the election, which would place the event in late May or early June, but then testifying that it could have been before the election. In any event, it appears that Gaston was describing a speech which occurred before the election, apparently in May. It seems that this speech is the subject matter of complaint paragraphs 11, 13, 14, and 15 which set forth a speech by D'Adamo "on or about May 5, 1981."

The bare reference by D'Adamo quoted by Gaston, referring to employees coming to him with their problems, is insufficient support for the complaint allegations that such was contrary to past practice. Thus, even though I credit Gaston, I shall dismiss complaint paragraphs 13, 14, and 15 which allege solicitation of grievances and a promise to remedy them.

Sales Director Carol Smith, when asked about the D'Adamo meeting Lewis had described, testified that D'Adamo explained the Union's dues structure at the meeting, and said whether the employees supported the Union was their choice and the employees could discuss it freely among themselves, but that he wanted the matter to be over with and to get on to the business of running the motel. She was there for the entire meeting and did not recall any threats that he made. She testified that D'Adamo read the rules and regulations and said that the motel would enforce the rules that everyone had signed. She testified that D'Adamo wanted to make everyone aware that, while the Union has its own rules, so does the motel. On redirect examination Smith stated that D'Adamo stated that there were rumors going around the motel that the motel rules would not be in effect because the Union would come in with its own rules and regulations which would govern. D'Adamo said that, although there would be union rules, the motel

also had its own rules which would still be in effect and adhered to.

Executive Housekeeper Ida Belle Davis testified that she was present at the April 21 meeting, and that D'Adamo tried to explain both sides of the union situation and did not threaten anyone. Davis explained that this meeting was held a couple of weeks before another meeting was held with her housekeeping personnel.

Conclusions

There is little dispute in the description of the several witnesses concerning the substance of the remarks made by D'Adamo on April 21. While some of Respondent's witnesses testified in conclusionary fashion that no threats were made, such opinion testimony, while permissible under the Federal Rules of Evidence, is not binding upon the fact finder. While I find that D'Adamo did discuss enforcement of the rules in a context of explaining that there were rumors going around the motel that the Union's rules would be controlling once the Union was voted in, I also find that he described examples of how the motel would depart from past practice in enforcing the motel rules *to the letter* if the Union were voted in. Accordingly, I find that the preponderance of the credible evidence supports a finding, which I make, that on April 21, and again on May 5, Respondent, through General Manager D'Adamo, threatened its employees with more strict enforcement of work rules if they supported the Union as alleged in complaint paragraph 11.

D. The Termination of Lewis

1. Coates' evaluation

When asked about Lewis' job performance following March 1, former Maintenance Supervisor Robert N. Coates testified:

Q. From that time on until the time Mr. Lewis was terminated from his employment at the motel in June of 1981, would you relate to the Court the manner in which he performed his assigned tasks?

A. Well, I think Mr. Lewis really tried to do his best, but in certain areas he just lacked in some of the more expertise, general knowledge of air-conditioning, refrigeration and electronics, which is a basic requirement for that type of maintenance.

Q. Did you ever have occasion to assign him jobs to do that he did not do?

A. I think he tried to do some of the jobs. Some of the jobs that I asked him to do were not completed to my satisfaction, but I think he really tried.

It is undisputed that Lewis injured his foot on the job while installing a kitchen vent fan. While Coates generalized that Lewis was off work for about 2 weeks in June, I credit the more specific testimony of Lewis that the injury occurred around May 1 and that he returned to work on June 8. Thus, Lewis was off work some 5 weeks, and was terminated 4 days after returning to work.

According to Coates, Lewis returned to work with an unfavorable change in attitude. The testimony of Coates on this crucial point is extremely vague. Thus:

Q. Did you make any recommendation to Mr. D'Adamo with regard to his continued employment or his termination?

A. We discussed his attitude after his return from some time off, and it did take a turn, and it got to the point where it wasn't working out, and I did suggest to Mr. D'Adamo that possibly some changes should be made, and it would be up to him to make the decision.

Q. And do I understand you to say that following his return from that time off he had a change in attitude?

A. Yes, I think there was a noticeable change that just wasn't working out.

And on cross-examination:

Q. Now, you stated earlier that when Mr. Lewis returned from his workers comp injury that his attitude changed. What do you mean by that?

A. Well, it's been some time, but to the best of my recollection, I would assign him tasks or jobs to do and I would have difficulty in locating him; he would be doing something else other than what I had given him directions to do.

Q. But he would be doing his work?

A. He would be doing some work.

Q. What specific kinds of tasks did you ask him to do?

A. I don't recall all the details, but I do recall a couple of instances where I gave him a specific job to perform and I couldn't find him, and then he didn't do the ones I asked him to do; he was doing some others.

Q. But you don't recall any specific tasks that you asked him to do?

A. I'd have to think for a moment. No, really, at this point in time it's difficult to remember all the details there were so many at that time.

Coates continued to testify in vague terms and in generalities. Although, as I find, Lewis returned to work for only 4 days before being fired, Coates generalized that he assigned many different tasks to Lewis over a period of time which does not coincide with the short 4-day period. Thus:

Q. So you are saying that over a period of almost two weeks you were observing this change in Mr. Lewis' attitude?

A. As I said before, I talked to Mr. D'Adamo and I did express that, yes.

Q. And over this almost two-week period, about how many occasions would you say that you assigned tasks to Mr. Lewis that he did not perform?

A. I do not recall the exact number, but it was several.

Q. Could you give us an estimate? Twenty, thirty?

A. At least ten or fifteen.

Q. Now, were these all major tasks that might have required, say, a full day's work to complete?

A. No.

Q. About how long would these take for him to have completed, if he had done them?

A. It would depend on the particular job. There was room repairs. There were minor jobs that would take small amounts of time. There were major jobs that would take a whole day.

Q. How many of them would you estimate would have been major tasks that would have taken a whole day?

A. During that time frame?

Q. During this almost two-week period when you were observing the change in his attitude.

A. Probably two, at the most.

Q. Now, during this almost two-week period were you reporting any of these incidents to Mr. D'Adamo as they were occurring?

A. No, that was my job to make note of, and I did not report it during that time until I felt I had an adequate record to submit to Mr. D'Adamo.

Q. I'm sorry; I didn't hear the last?

A. I said it was my job to compile the record, and I did not submit it until I thought I had an adequate file that would justify my position.¹⁵

And:

Q. Prior to Mr. Lewis being off on Workmen's Compensation you didn't have any difficulty with his attitude then, did you?

A. Well, no. We had a pretty good working relationship. He took direction well, and I think he was learning.

Q. So he did make a conscientious effort to do his work, didn't he?

A. I think he did for awhile, yes.

Q. And, in fact, didn't he thank you on occasion for helping impart knowledge to him?

A. Yes, he did.

On rebuttal, Lewis credibly denied that either his performance or attitude changed after his return to work on June 8. He credibly testified that Coates did not discuss his performance with him after his return either. On only one occasion did Coates ask Lewis where he had been. Lewis testified that he explained to Coates that he left his assigned task of repairing a toilet seat upon receiving an emergency call from the front desk on his beeper to restore the air-conditioning in a room. After Lewis explained where he had been, Coates simply asked if Lewis had corrected the (air-conditioning) problem, and said, "Okay, then."

Neither D'Adamo nor Coates saw fit to discuss with Lewis his sudden change to an unfavorable attitude. Such failure was a departure from Respondent's past practice. I credit Lewis, who testified persuasively on this point in contrast to the vague and undocumented testimony of Coates. In contrast to Coates' vagueness on

Lewis' attitude, I note that Coates was quite specific in his testimony on most other matters.

2. Lewis is fired

Lewis testified that, around 3:30 in the afternoon on June 12, he was summoned to the office of General Manager D'Adamo, who told him that he had just finished talking with (part owner) Charles Trout. Owner Trout told D'Adamo, according to the latter, that he had to cut back in all departments of the motel, including maintenance, because of budgetary considerations. D'Adamo told Lewis that he was laying him off but would call him back within 2 weeks when things picked up. D'Adamo gave Lewis an unspecified sum of money in cash after D'Adamo cashed a check.¹⁶

Three days later when Lewis visited the motel to pick up some of his belongings, he had a conversation with Executive Housekeeper Davis in which she made reference to Coates' having a new maintenance helper. Davis did not deny this testimony when she subsequently took the witness stand. Following this conversation with Davis, Lewis spoke with Maintenance Supervisor Coates by the swimming pool. No others were present. Lewis told him that he had come by to pick up the rest of his belongings and to ask Coates if he knew anything that had happened. According to Lewis, Coates said that he did not, that he had gone out to take care of some business for D'Adamo at the manager's pizza restaurant, and that, when he returned, D'Adamo told Coates that he had let Lewis go. Lewis asked him if he knew why, and Coates allegedly said, "[I]t was because of that damn union stuff." Coates continued by saying that if Lewis had done what D'Adamo had wanted him to do, concerning talking to the employees and dissuading them from supporting the Union, then everything would have been all right and Lewis would still be working at the motel. According to Lewis, Coates added, "You see, he already had messed over you one time before when he brought me in here to work, and now he is doing it to you again. I think it would be best for you to go ahead on and try to find somewhere else to work. And if you get a job, if you need me to recommend you, I will do that."

In his testimony Coates denied Lewis' description of the swimming pool conversation. On cross-examination he had first denied having a conversation with Lewis on June 15 by the swimming pool, and said that he thought that, if there had been such a conversation as that, he would recall it but that he does not. In answer to an additional question, Coates replied that it was true that he could have had a conversation with Lewis which he did not recall at the moment. However, this must be taken in the context that Coates had just testified that he and Lewis were constantly in contact with each other, were

¹⁵ Respondent did not offer in evidence any such file, or even a single note described here by Coates.

¹⁶ The testimony of Sales Director Smith that Lewis was given severance pay on June 12 in the form of a check, even if true, is not necessarily inconsistent with the testimony of Lewis. Thus, Smith conceded that she was not present at the termination interview and did not know if the check had a notation as to the purpose. Moreover, it is conceivable that, while a check may have issued, D'Adamo had Lewis endorse it and D'Adamo cashed it for him on the spot. In any event, Respondent did not see fit to introduce the canceled check in evidence.

friendly, had a very likable relationship, and had many conversations with each other on various topics.¹⁷

Lewis is black. Coates is white, and D'Adamo apparently is white. The first charge Lewis filed was with the Equal Employment Opportunity Commission on the basis of race and in retaliation for having spoken out on behalf of other blacks. Lewis alleged that his replacement is white. The EEOC charge was filed on June 16 (Resp. Exh. 1). Two days later, he filed the charge herein. The theories of the two charges are not mutually contradictory.

Conclusion

I find that Respondent was motivated to fire Lewis because of his strong support for the Union. It matters not that General Manager D'Adamo told several employees that they had a free choice on whether they wanted the Union. Respondent simply wanted to eliminate the employees' leader as a source of future problems as well as to punish him for his support of the Union. D'Adamo wasted no time in getting rid of Lewis once the latter returned to work after the election.¹⁸ D'Adamo falsely told Lewis he was just laying him off, when in fact he terminated Lewis and quickly hired a replacement helper.¹⁹

Respondent contends that it terminated Lewis because he was incompetent. Its chief evidence on this point relates to the period when Lewis was the maintenance supervisor. That is, it predates Coates' arrival and Lewis' demotion to helper on March 1. Respondent's post-March 1 evidence is the extremely nebulous testimony of Coates which, I find, covers a 4-day period—and that related to "attitude," not competency.²⁰ Surely Respondent, had it been in good faith, would have counseled Lewis, or even reprimanded him, in accordance with the motel's written rules and D'Adamo's own policy. Respondent did neither.²¹

In short, I find that the General Counsel established a strong case that Respondent discharged Lewis because of his union activities, and that Respondent's various contentions as to the reasons for the discharge are nothing but pretextual grounds. Accordingly, I shall order

that Respondent offer Lewis reinstatement and make him whole, with interest.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Retail, Wholesale and Department Store Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by unlawfully interrogating employees about their protected activities, promising them benefits if they refrained from supporting the Union, threatening employees with discharge if they support the Union, soliciting employees to solicit other employees to withdraw their support of the Union, threatening employees with more strict enforcement of work rules if they support the Union, and surveilling employees during a union meeting.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by discharging and failing to reinstate Curtis L. Lewis, Jr.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate Section 8(a)(1) of the Act by soliciting employee grievances or promising to remedy them on or about May 5, 1981.

THE REMEDY

In view of the foregoing, I shall recommend that Respondent be ordered to cease and desist its illegal conduct, to post an appropriate notice, and to offer immediate and full reinstatement to Curtis L. Lewis, Jr., and make him whole, with interest. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²²

The Respondent, Midwest Motel Management Corp. of Birmingham, Birmingham, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union activities and those of other employees.

(b) Promising employees money if they refrain from supporting a union and if they dissuade other employees from supporting a union.

¹⁷ On the other hand, it was not developed whether these conversations continued after the termination of Lewis.

¹⁸ Lewis served as the Union's observer at the election of May 15 while he apparently was in an off-duty status because of an on-the-job injury to one of his feet. He was fired 4 days after he returned to work.

¹⁹ Respondent's budgetary argument is therefore misplaced. Indeed, owner Schmalfeldt testified that normally a 120-room motel utilizes a maintenance complement of one "strong" (experienced) man and one "weak" man. At the time of the hearing in December, Respondent had only one maintenance employee. While budgetary considerations may have been a factor for that number at the time of the hearing, it is clear from Schmalfeldt's testimony that a prime reason was the winter season—no need for someone to perform yard work. In contrast, the outside, or yard work, is at its greatest need in June when Lewis was terminated.

²⁰ Such shifting of grounds is an indicium that an unlawful motive is the real reason for the discharge.

²¹ The fact that Coates was admittedly on good terms with Lewis, yet did not counsel Lewis regarding his supposed change in attitude, is a strong indication that "change of attitude" was advanced as a pretext to cover the true, and unlawful, reason for discharging Lewis. Respondent's defense has an extraordinary number of contradictions in both logic and common experience.

²² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Threatening employees with discharge if they support a union.

(d) Asking employees to solicit other employees to withdraw their support from a union.

(e) Threatening employees with more strict enforcement of work rules if they support a union.

(f) Surveilling employees while they are attending a union meeting.

(g) Discharging employees because they are active on behalf of a union.

(h) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist Retail, Wholesale and Department Store Union, or any other labor organization, to bargain collectively through representatives of their own choosing, to act together for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Offer Curtis L. Lewis, Jr., immediate and full reinstatement to his former position of employment or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all

payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the term of this Order.

(c) Post at its Birmingham, Alabama, motel signed and dated copies of the attached notice marked "Appendix."²³ Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations not specifically found herein, including paragraphs 13, 14, and 15.

²³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."